



(BILLING CODE: 3510-DS-P)

DEPARTMENT OF COMMERCE

International Trade Administration

A-570-929

Small Diameter Graphite Electrodes from the People's Republic of China: Initiation of Anticircumvention Inquiry

AGENCY: Import Administration, International Trade Administration,
Department of Commerce.

SUMMARY: In response to a request from SGL Carbon LLC and Superior Graphite Co. (the petitioners), the Department of Commerce (the Department) is initiating an anticircumvention inquiry pursuant to section 781(c) of the Tariff Act of 1930, as amended (the Act), to determine under the minor alterations provision whether graphite electrodes with diameters larger than 16 inches but less than 18 inches are products that are “altered in form or appearance in minor respects” from in-scope merchandise such that they may be considered subject to the antidumping duty order on small diameter graphite electrodes (SDGEs) from the People's Republic of China (PRC).¹

In addition, in response to a request from the petitioners, the Department is also initiating an anticircumvention inquiry pursuant to section 781(d) of the Act to determine whether graphite electrodes with diameters larger than 16 inches but less than 18 inches may be considered subject to the SDGE Order under the later-developed merchandise provision.

EFFECTIVE DATE: (Insert date of publication in the *Federal Register*).

FOR FURTHER INFORMATION CONTACT: Thomas Schauer, AD/CVD Operations,

¹ See *Antidumping Duty Order: Small Diameter Graphite Electrodes from the People's Republic of China*, 74 FR 8775 (February 26, 2009) (SDGE Order).

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SUPPLEMENTARY INFORMATION:

Background

On April 5, 2012, the petitioners alleged that Chinese producers of graphite electrodes are engaged in circumvention of the SDGE Order by exporting graphite electrodes that have diameters that are larger than 16 inches but less than 18 inches (alleged SDGEs) to the United States.² The petitioners requested that the Department initiate an anticircumvention proceeding, pursuant to 19 CFR 351.225(i), to determine whether the importation from the PRC of alleged SDGEs constitutes circumvention of the SDGE Order, as defined in section 781(c) of the Act. The petitioners additionally requested that the Department initiate an anticircumvention proceeding, pursuant to 19 CFR 351.225(j), to determine whether the importation of alleged SDGEs from the PRC constitutes circumvention of the SDGE Order, as defined in section 781(d) of the Act.

On April 24, 2012, the Department requested additional information from the petitioners.³ On May 4, 2012, we received the petitioners' response.⁴ On May 10, 2012, the petitioners submitted further evidence in support of their claims.⁵

² See Letter from the petitioners entitled, "Small Diameter Graphite Electrodes: Request for Scope/Circumvention Ruling," dated April 5, 2012 (Initiation Request). As indicated in the "Scope of the Order" section, below, the maximum diameter specific in the scope of the SDGE Order is 16 inches.

³ See the Department's Letter to the petitioners dated April 24, 2012.

⁴ See Letter from the petitioners dated May 4, 2012 (SQR).

⁵ See Letter from the petitioners dated May 10, 2012 (SQR2).

Scope of the Order

The merchandise covered by the order includes all small diameter graphite electrodes of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. The merchandise covered by the order also includes graphite pin joining systems for small diameter graphite electrodes, of any length, whether or not finished, of a kind used in furnaces, and whether or not the graphite pin joining system is attached to, sold with, or sold separately from, the small diameter graphite electrode. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes that are subject to the order are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheading 8545.11.0010.⁶ The HTSUS number is provided for convenience and customs purposes, but the written description of the scope is dispositive.

Initiation of Minor Alterations Anticircumvention Proceeding

Statutory Criteria for Initiation of Anticircumvention Proceeding Under Section 781(c) of the Act

Section 781(c) of the Act provides that the Department may find circumvention of an antidumping duty (AD) order when products which are of the class or kind of merchandise subject to an AD order have been “altered in form or appearance in minor respects . . . whether

⁶ The scope described in the SDGE Order refers to the HTSUS subheading 8545.11.0000. In their Initiation Request, the petitioners have informed the Department that, starting in 2010, imports of SDGEs are classified in the HTSUS under subheading 8545.11.0010 and imports of large diameter graphite electrodes are classified under subheading 8545.11.0020. See Initiation Request at 5.

or not included in the same tariff classification.” While the statute is silent as to what factors to consider in determining whether alterations are properly considered “minor,” the legislative history of this provision indicates that there are certain factors which should be considered before reaching a circumvention determination. In conducting a circumvention inquiry under section 781(c) of the Act, the Department has generally relied upon “such criteria as the overall physical characteristics of the merchandise, the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported products.” *See* S. Rep. No. 71, 100th Cong., 1st Sess. 100 (1987) (“In applying this provision, the Commerce Department should apply practical measurements regarding minor alterations, so that circumvention can be dealt with effectively, even where such alterations to an article technically transform it into a differently designated article.”).

The Petitioners’ Request for Initiation of an Anticircumvention Proceeding Under Section 781(c) of the Act

The petitioners claim that prior to imposition of the SDGE Order, no U.S. or Chinese producer manufactured 17-inch SDGEs or other non-even sizes (*e.g.*, 16 ½ inch); rather, standard sizes of SDGEs above 10 inches were produced only in even inch sizes (*i.e.*, 10, 12, 14, 16). Thus, according to the petitioners, SDGEs with a nominal or actual diameter of 16 inches or less represented the complete range of all SDGE production in both the United States and the PRC at the time of the imposition of the SDGE Order. The petitioners assert that certain Chinese producers are now exporting to the United States SDGEs with diameters that are slightly larger in diameter than the 16-inch maximum specified in the scope of the SDGE Order in order to evade payment of ADs.⁷ The petitioners provide import data to support their claim that the

⁷ Specifically, the petitioners identified Sinosteel Jilin Carbon Co., Ltd. and its exporting affiliate Jilin Carbon Import and Export Company (collectively, Jilin Carbon), as companies engaging in this practice. *See* SQR at 2. The

alleged SDGEs from the PRC spiked significantly during calendar years 2010 and 2011 after imposition of the SDGE Order.⁸ According to the petitioners, there is no significant commercial or technological reason for this alteration by the Chinese producers other than to circumvent ADs. The petitioners provide declarations from members of the U.S. SDGE industry to support these allegations.⁹

Concerning the allegation of minor alteration under section 781(c) of the Act and 19 CFR 351.225(i), the Department examines such factors as: 1) overall physical characteristics; 2) expectations of ultimate users; 3) use of merchandise; 4) channels of marketing; and 5) cost of any modification relative to the value of the imported products.¹⁰ Each case is highly dependent on the facts on the record, and must be analyzed in light of those specific facts. Thus, although not specified in the Act, the Department has also included additional factors in its analysis, such as commercial availability of the product at issue prior to the issuance of the order as well as the circumstances under which the products at issue entered the United States, the timing and quantity of said entries during the circumvention review period, and the input of consumers in the design phase of the product at issue. *See, e.g., CTL Plate from the PRC*, 74 FR at 33992-33993.

In the Initiation Request, the petitioners presented the following evidence with respect to each of the aforementioned criteria:

petitioners also asserted that Beijing Fangda Carbon-Tech Co., Ltd., Fangda Carbon New Material Co., Ltd., and Fushun Jinly Petrochemical Carbon may be exporting alleged SDGEs to the United States. *Id.* at 3-4.

⁸ *See* Initiation Request at Exhibit 2 and SQR at Exhibit 6.

⁹ *See* Initiation Request at Exhibit 1, SQR at Exhibit 2, and SQR2 at Exhibit 1.

¹⁰ *See, e.g., Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Steel Plate from the People's Republic of China*, 74 FR 33991, 33992 (July 14, 2009) (*CTL Plate from the PRC*) (unchanged in *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*; 74 FR 40565 (August 12, 2009)).

A. Overall Physical Characteristics

The petitioners contend that alleged SDGEs exported to the United States have the same physical characteristics as those subject to the SDGE Order with the exception of the diameter. According to the petitioners, alleged SDGEs are produced in the same process as subject SDGEs and the slight increase of the diameter does not significantly change the SDGE's bulk density, specific electrical resistance, coefficient of thermal expansion, or flexural strength.¹¹ Moreover, the petitioners contend that alleged SDGEs are sold and purchased as SDGEs as direct substitutes for, and are interchangeable with, 16-inch SDGEs.¹² In support, the petitioners provide declarations from members of the U.S. industry and a sales call report.¹³

B. Expectations of the Ultimate Users

The petitioners assert that the ultimate purchasers of alleged SDGEs and in-scope 16-inch SDGEs expect that they are interchangeable. In support, the petitioners provide declarations from members of the U.S. SDGE industry stating that they are unaware of any instances in which customers expected any significantly different characteristics or uses by purchasing alleged SDGEs other than to avoid payment of ADs.¹⁴ The petitioners claim that, to the best of their knowledge, the customers purchasing alleged SDGEs all used 16-inch SDGEs before the introduction of alleged SDGEs and that the diameter increase provides no significant added commercial or industrial improvement.¹⁵

¹¹ See Initiation Request at 7.

¹² *Id.*

¹³ *Id.* at Exhibit 1.

¹⁴ *Id.* at 10 and Exhibit 1

¹⁵ *Id.*

C. Use of the Merchandise

The petitioners assert that the alleged SDGEs are sold to the same customers for the same end uses as the subject merchandise (*i.e.*, to be used as conductors of electricity in furnaces that heat or melt scrap metal or other material used to produce steel) and that the alleged SDGEs are a direct substitute for in-scope SDGEs that were previously purchased by the same end-users. In support, the petitioners provide declarations to this effect from members of the U.S. industry.¹⁶

D. Channels of Marketing

The petitioners assert that both alleged SDGEs and in-scope SDGEs are sold directly to foundries and steel producers, and that they are aware of at least one U.S. customer that was previously purchasing the subject merchandise who has simply substituted the alleged SDGEs for in-scope 16-inch SDGEs. In support, the petitioners provide declarations to this effect from members of the U.S. industry.¹⁷

E. Cost of Modification Relative to Total Value

The petitioners assert that the cost of modifying SDGEs to a diameter above the 16-inch maximum is minimal. In support, the petitioners provide declarations from members of the U.S. industry describing the cost of modifying SDGEs to a diameter above the 16-inch maximum.¹⁸

Analysis

As described above, the petitioners included declarations from members of the U.S. industry addressing the five factors the Department typically examines as part of a minor alterations inquiry under section 781(c) of the Act and 19 CFR 351.225(i). These declarations

¹⁶ *Id.* at 10-11 and Exhibit 1.

¹⁷ *Id.* at 11-12 and Exhibit 1.

¹⁸ *Id.* at 12 and Exhibit 1.

attest that graphite electrodes with diameters that are larger than 16 inches but less than 18 inches do not differ in any meaningful way from and are substitutable with SDGEs covered by the scope of the SDGE Order.¹⁹ Specifically, the declarations attest that: 1) with the exception of diameter, the overall physical characteristics of the alleged SDGEs and subject SDGEs are the same; 2) the expectations of ultimate users of the alleged SDGEs and subject SDGEs are the same; 3) the uses of the alleged SDGEs and subject SDGEs are the same; 4) the channels of marketing the alleged SDGEs and subject SDGEs are the same; and 5) the relative cost to modify graphite electrodes to a diameter larger than 16 inches but less than 18 inches is minimal.²⁰ We have examined the declarations and found that the persons making them are in a position to have knowledge about the facts described in the declarations with respect to each of the aforementioned factors. Because these declarations are largely business proprietary and cannot be further discussed in a public notice, *see* the Memorandum to the File dated concurrently with this notice for a discussion of our analysis with respect to these declarations.

In addition to the information described above, the petitioners provided data to support their claim that imports of the alleged SDGEs from the PRC spiked significantly during calendar years 2010 and 2011 after imposition of the SDGE Order.²¹ Although the import data does not segregate the alleged SDGEs from graphite electrodes with diameters of 18 inches or larger, the import data does show that imports of subject SDGEs decreased substantially (from a monthly average of over 500 metric tons in the first quarter of 2010 to a monthly average of less than 110 metric tons thereafter) while imports of non-subject graphite electrodes (*i.e.*, with diameters

¹⁹ *Id.* at Exhibit 1.

²⁰ *Id.*

²¹ *See* SQR at Exhibit 6.

exceeding the specified maximum) increased substantially (from a monthly average of less than 600 metric tons in the first quarter of 2010 to a monthly average of more than 1,600 metric tons thereafter).²²

We have determined that the evidence submitted by the petitioners concerning a surge in imports of the allegedly circumventing merchandise in combination with affidavits that this merchandise is now being used instead of subject merchandise is sufficient for purposes of initiating an anticircumvention inquiry under section 781(c) of the Act and 19 CFR 351.225(i). We will consider and address the information and arguments raised by all parties, including the respondents, in the context of this inquiry.

Merchandise Subject to the Minor Alterations Anticircumvention Proceeding

This minor alterations anticircumvention inquiry covers graphite electrodes from the PRC that have diameters larger than 16 inches but less than 18 inches. Based upon information submitted by the petitioners, our inquiry will cover the following producers: Jilin Carbon, Beijing Fangda Carbon-Tech Co., Ltd., Fangda Carbon New Material Co., Ltd., and Fushun Jinly Petrochemical Carbon.²³ If the Department receives a formal request from an interested party regarding potential circumvention of the SDGE Order by other companies in the PRC under section 781(c) of the Act within sufficient time, we will consider conducting additional inquiries concurrently.

²² *Id.*

²³ *See* SQR at 2-4.

Initiation of Later-Developed Merchandise Anticircumvention Proceeding

Statutory Criteria for Initiation of Anticircumvention Proceeding Under Section 781(d) of the Act

Section 781(d) of the Act provides that the Department may find circumvention of an AD order with respect to “merchandise developed after an investigation is initiated.” Section 781(d)(1) of the Act provides that the Department “shall consider whether

(A) the later-developed merchandise has the same general physical characteristics as the merchandise with respect to which the order was originally issued (hereafter in this paragraph referred to as the ‘earlier product’),

(B) the expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product,

(C) the ultimate use of the earlier product and the later-developed merchandise are the same,

(D) the later-developed merchandise is sold through the same channels of trade as the earlier product, and

(E) the later-developed merchandise is advertised and displayed in a manner similar to the earlier product.”

Section 781(d)(1) of the Act further provides that the Department “shall take into account any advice provided by the Commission under subsection (e) {of section 781 of the Act} before making a determination under this subparagraph.”

The Petitioners' Request for Initiation of an Anticircumvention Proceeding Under Section 781(d) of the Act

The petitioners requested that, if the Department does not find that alleged SDGEs are within the scope of the SDGE Order on the basis of section 781(c) of the Act, the Department

initiate an anticircumvention inquiry under the later-developed merchandise provision (*i.e.*, section 781(d) of the Act).

As described in the “Initiation of Minor Alterations Anticircumvention Proceeding” section, above, the petitioners claim that prior to imposition of the SDGE Order, no U.S. or Chinese producer manufactured 17-inch SDGEs or other non-even sizes (*e.g.*, 16 ½ inch). According to the petitioners, neither the National Electrical Manufacturers Association, the International Electrotechnical Commission, nor the Japanese Industrial Standard acknowledges that 17-inch SDGEs were offered in the marketplace.²⁴ The petitioners further assert that no U.S. or Chinese producer manufactured 17-inch SDGEs prior to imposition of the SDGE Order.²⁵

Concerning the allegation of later-developed merchandise under section 781(d) of the Act and 19 CFR 351.225(j), the Department examines the above-enumerated factors in section 781(d)(1) of the Act. Each case is highly dependent on the facts on the record, and must be analyzed in light of those specific facts. As indicated above, the Department has also considered additional factors in its anticircumvention analysis, such as commercial availability of the product at issue prior to the issuance of the order as well as the circumstances under which the products at issue entered the United States, the timing and quantity of said entries during the circumvention review period, and the input of consumers in the design phase of the product at issue. *See, e.g., CTL Plate from the PRC*, 74 FR at 33992-33993.

In the Initiation Request, the petitioners presented evidence with respect to each of the aforementioned criteria. The evidence the petitioners provided with respect to overall physical characteristics, expectations of the ultimate users, use of the merchandise, and channels of trade

²⁴ *See* Initiation request at 15 and Exhibit 3.

²⁵ *Id.* at 15.

is described in the “Initiation of Minor Alterations Anticircumvention Proceeding” section, above. With respect to the final criterion, advertising, the petitioners argue that, given that the Chinese producers are selling the alleged SDGEs to the same customers and for the same purposes as 16-inch SDGEs, there are no significant differences in the manner in which the product is advertised.²⁶ The petitioners contend that, in fact, none of the Chinese producers appears to be advertising this product at all.²⁷ The petitioners assert that the fact that the Chinese producers do not advertise alleged SDGEs to their home market customers is evidence that they are not selling them in the home market and that this fact evinces that the purpose of producing alleged SDGEs is not to meet customer demand for that particular size but to circumvent the SDGE Order.²⁸ The petitioners provide printouts of Chinese producers’ web pages to support these assertions.²⁹

Analysis

Based in part on our analysis of the petitioners’ minor alterations anticircumvention inquiry request, summarized above, the Department determines that the petitioners have also satisfied the criteria to warrant an initiation of a formal anticircumvention inquiry pursuant to section 781(d) of the Act and 19 CFR 351.225(j).

The first four statutory criteria are (1) the later-developed merchandise has the same general physical characteristics as the merchandise with respect to which the order was originally issued (hereafter in this paragraph referred to as the “earlier product,” (2) the expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product,

²⁶ *Id.* at 17.

²⁷ *Id.* at 17 and Exhibit 4.

²⁸ *Id.* at 17.

²⁹ *Id.* at Exhibit 4.

(3) the ultimate use of the earlier product and the later-developed merchandise are the same, and
(4) the later-developed merchandise is sold through the same channels of trade as the earlier product. These are the same as the first four criteria we examined with respect to the minor alteration allegation and our analysis with respect to these criteria is described in the “Initiation of Minor Alterations Anticircumvention Proceeding” section, above.

Concerning the fifth factor, advertising, the webpage printouts submitted by the petitioners indicate that Chinese producers minimally advertise graphite electrodes with diameters larger than 16 inches but less than 18 inches, if at all.³⁰ This suggests that the purpose of producing alleged SDGEs is not to meet customer demand for that particular size but may be to circumvent the SDGE Order.

As described in the “Initiation of Minor Alterations Anticircumvention Proceeding” section, above, the petitioners additionally provided data to support their claim that imports of the alleged SDGEs from the PRC spiked significantly during calendar years 2010 and 2011 after imposition of the SDGE Order.³¹

We have determined that the evidence submitted by the petitioners concerning a surge in imports of the allegedly circumventing merchandise in combination with affidavits that this merchandise is now being used instead of subject merchandise is sufficient for purposes of initiating an anticircumvention inquiry under section 781(d) of the Act and 19 CFR 351.225(j). We will consider and address the information and arguments raised by all parties, including the respondents, in the context of this inquiry.

³⁰ *Id.* at Exhibit 4

³¹ *See* SQR at Exhibit 6.

The Department will not order the suspension of liquidation of entries of any additional merchandise at this time. However, in accordance with 19 CFR 351.225(l)(2), if the Department issues a preliminary affirmative determination, we will then instruct U.S. Customs and Border Protection to suspend liquidation and require a cash deposit of estimated duties on the merchandise.

Following consultation with interested parties, the Department will establish a schedule for questionnaires and comments on the issues. In accordance with section 781(e)(1) of the Act and 19 CFR 351.225(f)(7)(i)(C), we intend to notify the International Trade Commission in the event of an affirmative preliminary determination of circumvention under section 781(d) of the Act. The Department intends to issue its final determinations within 300 days of the date of publication of this initiation.

This notice is published in accordance with sections 781(c) and 781(d) of the Act and 19 CFR 351.225(i) and (j).

Paul Piquado
Assistant Secretary
for Import Administration

June 18, 2012
(Date)

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